Esso Production Malaysia Inc v Aladdin bin Mohd Hashim

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–384 OF 1997
GOPAL SRI RAM, DENIS ONG AND HAIDAR JJCA
21 FEBRUARY 2000

Labour Law *— Industrial Court — Procedure — Postponement — Cause of delay in proceedings — Principles applicable in granting postponement — Whether postponement should be granted*

Labour Law *— Industrial Court — Procedure — Dismissal on charge of bribery — Lack of legal representation — Whether respondent given fair opportunity to redeem his reputation — Whether fair procedure was given to respondent*

The respondent was dismissed by the appellant following a domestic enquiry whereby he was found guilty of bribery. The dispute was referred to the Industrial Court. The hearing before the Industrial Court was adjourned for a few times, but not at the behest of the respondent. A new date for hearing was subsequently fixed on 18 July 1994. The respondent's solicitor applied for an adjournment because he was engaged in a criminal case and was unable to attend at the Industrial Court. The request for adjournment was turned down and the solicitor withdrew from the case. According to the respondent, he was only made aware of these circumstances some six days before the hearing. When the matter was called on for hearing, the respondent appeared in person and requested for an adjournment but he was refused on objection being taken by the appellant. The Industrial Court upheld the respondent's dismissal and agreed with the appellant's contention that the charge of bribery had been made out. The respondent made an application for orders of certiorari and mandamus which were granted by the High Court. The appellant appealed.

Held, dismissing the appeal:

(1) The Industrial Court when holding that the trial had been postponed on a number of occasions failed to take into account the fact that on two of those occasions, the postponements were not at the behest of the respondent. The ruling of the Industrial Court gave the impression that the respondent was responsible for the delay in the proceedings. That was plainly not the case (see p 275F–G).

(2) The court took into consideration that the charge was one of bribery. If proved, it demolishes the reputation of the person against it is made. In the circumstances, the issue was whether the respondent was given a fair opportunity to redeem his reputation. The court found that the respondent was not given a fair opportunity. The right to legal representation is a sine qua non in

A a case as the present. The Industrial Court ought to have allowed the respondent to be represented by legal counsel who is trained in the skill of cross-examination. Therefore, the court was left in serious doubt whether the respondent was able to get his point across during cross-examination. Therefore the court was unable to say with confidence that a fair procedure was given to the
B respondent on the facts peculiar to this case (see p 275G–I).

[Bahasa Malaysia summary

C Responden telah dipecat oleh perayu berikutan dengan satu siasatan domestik di mana beliau telah didapati bersalah kerana penyogokan. Pertikaian tersebut telah dirujuk kepada Mahkamah Perusahaan. Perbicaraan di hadapan Mahkamah Perusahaan telah ditangguhkan beberapa kali, tetapi bukan atas perintah responden. Satu tarikh baru untuk perbicaraan telah kemudiannya ditetapkan pada 18 Julai 1994.
D Peguamcara responden telah memohon untuk mendapatkan satu penangguhan kerana beliau sedang mengendalikan satu kes jenayah dan tidak dapat hadir di Mahkamah Perusahaan tersebut. Permintaan untuk penangguhan telah ditolak dan peguamcara tersebut telah menarik diri daripada kes itu. Menurut responden, beliau hanya dimaklumkan mengenai keadaan ini lebih kurang enam hari sebelum
E perbicaraan. Ketika perkara tersebut dipanggil untuk perbicaraan, responden telah hadir sendiri dan memohon untuk penangguhan tetapi telah ditolak atas bantahan yang dibuat oleh perayu. Mahkamah Perusahaan mengesahkan pemecatan responden dan bersetuju dengan penegasan perayu bahawa pertuduhan sogokan telah pun dibuat. Responden telah membuat satu permohonan untuk perintah-
F perintah certiorari dan mandamus yang mana telah diberikan oleh Mahkamah Tinggi. Perayu telah merayu.

Diputuskan, menolak rayuan tersebut:

G (1) Mahkamah Perusahaan ketika memutuskan bahawa perbicaraan telah ditangguhkan beberapa kali gagal mengambilkira hakikat bahawa pada dua keadaan, penangguhan bukan atas perintah responden. Keputusan Mahkamah Perusahaan memberikan tanggapan bahawa responden bertanggungjawab bagi kelewatan dalam prosiding tersebut. Itu jelas bukan keadaannya (lihat
H ms 275F–G).

(2) Mahkamah mengambilkira bahawa pertuduhan tersebut adalah sogokan. Jika terbukti, ia memusnahkan reputasi orang terhadap siapa pertuduhan itu dibuat. Dalam keadaan tersebut, ia adalah sama ada responden telah diberikan peluang yang adil untuk menebus reputasinya. Mahkamah mendapati bahawa responden
I telah tidak diberi peluang yang adil. Hak untuk diwakili di sisi undang-undang adalah suatu sine qua non dalam sesuatu kes seperti kes semasa ini. Mahkamah Perusahaan seharusnya

membenarkan supaya responden diwakili oleh peguam yang terlatih di sisi undang-undang dalam kemahiran memeriksa balas. Oleh itu mahkamah berada dalam keadaan keraguan yang serius sama ada responden dapat menyampaikan maksudnya ketika pemeriksaan balas. Dengan itu, mahkamah tidak dapat menyatakan dengan yakinnya bahawa satu prosedur yang adil telah diberikan kepada responden berdasarkan fakta-fakta yang khusus kepada kes ini (lihat ms 275G–I).] A B

Notes

For cases on procedure applicable in the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1111–1114. C

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (refd) D

Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers [1983] 1 MLJ 175 (refd)

Lee Ah Tee v Ong Tiow Pheng & Ors [1984] 1 MLJ 107 (refd)

Nordin Hamid & Co v Pathmarajah & Anor [1990] 2 MLJ 308 (refd)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd) E

Legislation referred to

Federal Constitution art 5

Industrial Relations Act 1967 s 20

Appeal from: Originating Motion No R1–25–1 of 1995 (High Court, Kuala Lumpur) F

Andrew Saw (*Jacqueline Christie* and *LK Mah* with him) (*Ng Yook Woon & Andrew TC Saw*) for the appellant.

LG Seah (*Lobo & Associates*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court): The issue in this appeal is whether the learned judge of the High Court was right in granting certiorari to quash an award of the Industrial Court upholding the dismissal of the respondent. The factual background against which this appeal rests may be shortly stated. G

At all material times, the respondent was employed as an accounts clerk in the Material Accounting Group Department of the appellant. He commenced employment in 1976. On 26 March 1992, following an allegation of bribery against the respondent, the appellant held a domestic inquiry at the conclusion of which the respondent was dismissed. Needless to say, the decision to dismiss was based on the truth of the allegation made against him. H I

The respondent being dissatisfied, invoked the procedure prescribed by s 20 of the Industrial Relations Act 1967. Eventually, on 17 October

1992, the Honourable Minister referred the dispute between the appellant and the respondent to the Industrial Court. The Industrial Court, after directing an exchange of pleadings, fixed the matter for hearing on 26–29 June 1993.

The hearing proceeded on the first day but was later adjourned in respect of the other days because the then counsel for the respondent was unfamiliar with his client's case. The matter was later fixed for hearing on 28 and 29 September 1993 at Kuala Terengganu. In the meantime, all that had happened was that the first witness of the appellant had commenced his evidence-in-chief.

Due to some reason not apparent before us, the Industrial Court vacated the hearing dates on 28 and 29 September 1993. The matter was then fixed for mention on 2 October 1993 and further dates of hearing on 3–6 January 1994 were assigned. However, these dates were also vacated because of the monsoon season which intervened, making travel to Kuala Terengganu impossible. Once again new dates were fixed from 18–21 July 1994. Notice of these dates was given some six months in advance.

About a month before 18 July 1994 the respondent's new solicitor applied for an adjournment in writing. That was turned down by the Industrial Court. Then about two weeks before 18 July 1994, the respondent's solicitor wrote once again asking for an adjournment on the ground that he was engaged in a criminal case and was unable to attend at the Industrial Court. That request being turned down, the solicitor withdrew from the case.

According to the respondent, he was only made aware of these circumstances some six days before the hearing. When the matter was called on for hearing, the respondent appeared in person and requested for an adjournment but he was refused on objection being taken by the appellant's counsel. After hearing the respective addresses, the Industrial Court made the following ruling:

> There has been more than two postponements already. The claimant has changed two lawyers. Encik Zulkifly Nordin, then changed to En Wan Muttalib to handle. In the last hearing at Terengganu — due to monsoon season the case was postponed. The claimant's solicitor, En Wan Muttalib now has discharged himself due to a criminal case. The claimant's case is part-heard many times.

The upshot was that the adjournment was refused and the case went on. The Industrial Court at the end of the hearing reserved its decision and handed down its award some three months later. As we earlier said, it upheld the respondent's dismissal and agreed with the appellant's contention that the charge of bribery had been made out. The respondent then moved the High Court of Kuala Lumpur for orders of certiorari and mandamus. He sought a quashing of the award and a reference back to the Industrial Court for a rehearing of his case. The learned judge who heard the application granted it and issued the orders prayed for by the respondent. Present appeal brought against that decision.

At the forefront of his argument, Mr Andrew Saw, for the appellant, submitted that the refusal of the adjournment was entirely proper since the Industrial Court was a master of its own proceedings. It had acted entirely properly having regard to the facts and circumstances of the instant case. Counsel placed special emphasis on the fact that the respondent had failed to provide any satisfactory explanation for his failure to take steps to engage another solicitor to represent him on 18 July 1994. Mr Saw says this is an important fact overlooked by the learned judge when coming to his decision. In support of his argument, he referred to the judgment of Eusoff Chin J (as he then was) in *Nordin Hamid & Co v Pathmarajah & Anor* [1990] 2 MLJ 308, where the learned Chief Justice at p 311 of the case referred to and acted upon the following passage of Hashim Yeop Sani FJ in *Lee Ah Tee v Ong Tiow Pheng & Ors* [1984] 1 MLJ 107:

> The discretion of the judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick v Piller* [1943] 1 All ER 627. We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:
>
> (1) Whether or not a party should be granted an adjournment is wholly at the discretion of the judge. He would exercise his discretion solely upon his view of the facts.
>
> (2) Prima facie this discretion is unfettered.
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> (3) The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.
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> (4) Although an appellate court has power to interfere with the judge's decision in regard to the granting of the adjournment, it would refrain from doing so unless it appears that the discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.
>
> (5) An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion.

The learned Chief Justice then went on to say:

> Having regard to the background of the proceeding, the conduct of the applicant before the Industrial Court and the requirements of s 30(3) of the Act, I find that the Industrial Court had acted reasonably, and had not acted in excess of its jurisdiction or in breach of the rules of natural justice when it decided to proceed to hear and dispose of the reference notwithstanding the last minute application for the adjournment and the subsequent act of the applicant's counsel discharging themselves from acting for the applicant.

The principle that is to be distilled from *Nordin Hamid* and allied cases is that the Industrial Court must act reasonably when exercising its discretion when allowing adjournments. Generally speaking, when a court exercises its discretion, and this includes the Industrial Court, a higher court, whether on appeal or on certiorari, should be slow to interfere with the exercise of discretion. As the Privy Council observed in *Ratnam v Cumarasamy & Anor*

A [1965] 1 MLJ 228, there is a presumption that a discretion has been properly exercised. The burden is on he who asserts that the discretion was wrongly exercised. In the exercise of such discretion by the Industrial Court, regard should be had to the factual matrix against which the discretion was exercised, including the reasons for the way in which it was exercised.

B Thus, if the Industrial Court took into account irrelevant considerations or failed to take into account relevant considerations, the discretion will be described as having been unreasonably exercised. It will also be described as unreasonable if no reasonable tribunal similarly circumstanced would have come to a similar decision: *Associated Provincial*
C *Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

That brings us to the present appeal.

On the facts, the question is whether the Industrial Court exercised its discretion wrongly. We must confess that when we first read the appeal record, we were inclined to agree with the arguments of Mr Andrew Saw.
D But, having heard Ms Seah and having addressed our minds carefully to the peculiar facts of this case, we must with respect, agree with the learned judge although we do so for different reasons.

The learned judge proceeded on the footing that the appellant had been deprived of his constitutional right to legal representation and that there had
E been a breach of art 5 of the Federal Constitution. We cannot accept that. This case does not turn on the provisions of the Federal Constitution. Neither does it have any relevance to the authority relied on by the learned judge and by Ms Seah before us. We are in agreement with Mr. Andrew Saw that the case of *Federal Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 is entirely irrelevant. But there are
F two reasons why the learned judge was right in his decision.

First, the Industrial Court when holding that the trial had been postponed on a number of occasions failed to take into account the fact that on two of those occasions, the postponements were not at the behest of the respondent. If one reads the ruling of the learned chairman, one gets the
G impression that the respondent was responsible for the delay in the proceedings. That was plainly not the case.

The second reason is the nature of the allegations against the respondent. We remind ourselves that the charge is one of bribery. If proved, it demolishes the reputation of the person against whom it is made. In the circumstances, the issue is whether the respondent was given a fair
H opportunity to redeem his reputation. With respect, we do not think he was. The right to legal representation is a sine qua non in a case as the present. The Industrial Court ought to have allowed the respondent to be represented by legal counsel who is trained in the skill of cross-examination.

We are therefore left in serious doubt whether the respondent was able
I to get his points across during cross-examination. We are therefore unable to say with confidence that a fair procedure was given to the respondent on the facts peculiar to this case.

For these reasons, we will affirm the orders of the learned judge. It follows that the appeal is dismissed with costs. The orders of the learned judge are affirmed.

Appeal dismissed.

Reported by Jafisah Jaafar